**No.** _____

In the

# Supreme Court of the United States

BLAKE TAYLOR,
*PETITIONER*,

v.

UNITED STATES OF AMERICA,
*RESPONDENT*,

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether attempted bank robbery, 18 U.S.C. § 2113(a), and attempted armed bank robbery, 18 U.S.C. § 2113(d), are "crimes of violence" as defined in 18 U.S.C. § 924(c)(3)(A). Specifically,

(1) whether an attempt offense under § 2113(a) requires the actual use or threat of force because the attempt element relates only to the taking element; and

(2) whether an attempt offense under § 2113(d), which broadly proscribes any attempt to commit an offense under § 2113(a) requires the actual use or threat of force.

## PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

## DIRECTLY RELATED PROCEEDINGS

1. *United States v. Blake Taylor*, No. 4:18-CR-231-1 (N.D. Tex.)

2. *United States v. Blake Taylor*, No. 19-10261 (5th Cir.)

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Blake Taylor asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The Fifth Circuit's opinion in this case was not selected for publication in the Federal Reporter. It can be found at No. 19-10261, 2023 WL 4118572 (5th Cir. June 22, 2023), and is reprinted in the Appendix.

## JURISDICTION

The Fifth Circuit issued its judgment on June 22, 2023. This petition is timely filed under S. Ct. R. 13.3. This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant portions of 18 U.S.C. § 2113 provide as follows:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association. . ..
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.
>
> ***
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

The relevant portions of 18 U.S.C. §§ 924(c) provide as follows:

(1)(A) [A]ny person who, during and in relation to any crime of

violence . . ., uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

* * *

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]

## INTRODUCTION

This petition presents the question of whether the decision in *United States v. (Justin) Taylor*, holding that attempted Hobbs Act robbery is not a predicate crime of violence, applies to the attempt provisions of the federal bank robbery statute at 18 U.S.C. §§ 2113(a) and (d). Specifically, the Court is asked to resolve a circuit split as to whether an attempt offense under § 2113(a) requires the actual use or threat of force; and if so, whether the broader attempt offense under § 2113(d) may nevertheless be proven absent an actual threat or attempt to use force.

## STATEMENT

Petitioner was indicted for attempted bank robbery in violation of 18 U.S.C. §§ 2113(a) & (d) and discharging a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c). He moved to dismiss the § 924(c) count, arguing that the predicate crime under § 2113 did not count as a "crime of violence" without the unconstitutional residual clause found in 18 U.S.C. § 924(c)(3)(B). The district court denied the motion and ultimately imposed a sentence of 45 years in prison. Without the § 924(c) conviction, the statutory maximum would have been 25 years in prison. *See* 18 U.S.C. § 2113(d).

On appeal, the Fifth Circuit rejected the argument that a § 2113 offense could not satisfy the statutory "crime of violence" definition as narrowed by *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019). *United States v. [Blake] Taylor*, 844 Fed. Appx. 705 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 2862 (U.S. June 27, 2022) (No. 21-5065). This Court granted a petition for writ of certiorari, vacated, and remanded for further consideration in light of *United States v. [Justin] Taylor*, 142 S.Ct. 2015 (2021). *Id.*

On remand, Petitioner argued, *inter alia*, that the attempt provisions in Sections 2113(a) and (d) do not require that the government prove an actual threat or attempted use of force, and accordingly, are not crimes of violence using the analysis in *[Justin] Taylor*. The Fifth Circuit again affirmed, bound by its prior decision in *United States v. Bellew*, 369 F.3d 450, 454 (5th Cir. 2004), holding that "§ 2113(a) defines attempted and completed bank robbery as forms of a single offense that necessarily involves the actual use of force or intimidation." *United States v. [Blake] Taylor*, No. 19-10261, 2023 WL 4118572, at *1 (5th Cir. June 22, 2023). The court further concluded, without analysis, that because a violation of § 2113(a) is a lesser-included offense of a § 2113(d) violation, the more general attempt provision at § 2113(d) also involves the actual use of force or intimidation. *Id.* at *2.

## REASONS TO GRANT THE PETITION

There is a deep split among the circuit courts of appeal as to whether an attempt offense under § 2113(a) requires at least intimidation or a threat of force. Not only does this split create a disparity in the conduct required for conviction, it will create a similar inconsistency across the circuits in the categorical analysis of whether attempted bank robbery and attempted armed bank robbery remain predicate crimes of violence following this Court's decision in *United States v. Taylor*, 142 S. Ct. 2015, 2020-21 (2022) (holding that attempted Hobbs Act robbery, 18 U.S.C. § 1951(a), does not have as an element the use, attempted use, or threatened use of force).

Furthermore, even if the attempt offense in § 2113(a) does require an element of actual or threatened use of force, the broader attempt offense under § 2113(d)—which includes *any* attempt to commit an offense under § 2113(a)—does not, and the Fifth Circuit's statutory analysis is flawed.

### I. Categorical assessment of attempt offenses after *Taylor*

"To determine whether a federal felony may serve as a predicate for a conviction and sentence under the elements clause . . . [t]he only relevant question is whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force." *Taylor*, 142 S. Ct. at 2020.

In *Taylor*, this Court answered that question in the negative, holding that a conviction for attempted Hobbs Act robbery, 18 U.S.C. § 1951(a), cannot serve as a predicate for conviction under § 924(c) because it does not constitute a "crime of violence" as defined in § 924(c)(3)(A). 142 S. Ct. at 2020-21. That is, to prove attempted

Hobbs Act robbery, the government need only show that the defendant took a substantial step toward carrying out his intent to take another's property by threat or force.[1] *Id*. at 2020-21. "Simply put, no element of attempted Hobbs Act robbery requires proof that the defendant used, attempted to use, or threatened to use force." *Id*. The Court unequivocally rejected the argument that an attempt to commit a crime of violence is in and of itself a crime of violence as "resting on a false premise." 142 S. Ct. at 2022.

## II. The attempt offense in Section 2113(a) does not require intimidation or the threat of force.

Like the Hobbs Act, the federal bank robbery statute similarly punishes both attempts and substantive robberies. Assuming the completed crimes require at least the "threatened use of physical force against" the victim, § 924(c)(3)(A), the attempt crime does not. As *Taylor* held, attempted Hobbs Act robbery has two elements: "(1) The defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a 'substantial step' toward that end." 142 S. Ct. at 2020. Neither of those elements require proof of attempted or threatened use of physical force. This same construction should be applied to § 2113(a).

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[1]The statute reads:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or im-prisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951(a), (b)(1).

The Fifth Circuit, however, construes the attempt provision of § 2113(a) to require at least an act of intimidation or threatened force. In *United States v. Bellew*, 369 F.3d 450 (5th Cir. 2004), the court recognized competing readings of the statute:

> One reading of the first paragraph of Section 2113(a) is that a defendant must actually commit an act of intimidation while wrongfully taking or attempting to take money from the presence of a person at a bank. That is, the attempt only relates to the taking, not the intimidation. Another reading, urged by the government, is that all that is required to violate the statute is for a defendant to attempt to intimidate while attempting to rob a bank.

369 F.3d at 454. The court adopted the former, finding that an "actual act of intimidation" is required for conviction. *Id.* Bound by the holding in *Bellew*, the court denied petitioner's appeal here. *[Blake] Taylor*, 2023 WL 4118572, at *1.

The Seventh, Eighth and Tenth Circuits agree. *See United States v. Crosby*, 416 Fed. Appx. 776 (10th Cir. 2011) (Jury instructions accurately stated that government was required to prove "the defendant attempted to take . . . by force and violence or intimidation."); *United States v. Thornton*, 539 F.3d 741, 748 (7th Cir. 2008) ("§ 2113(a) requires actual intimidation for a conviction"); *United States v. Brown*, 412 F.2d 381, 384 n. 4 (8th Cir.1969) (approving of jury instruction on intimidation that required proof of one or more acts or statements done or made so as to produce in an ordinary person fear of bodily harm); *Eighth Circuit Manual of Model Jury Instructions (Criminal*) 6.18.2113A (2022) (requiring proof that attempted taking is by force or intimidation).

The Second, Fourth, Sixth, and Ninth Circuits, by contrast, have held that only a substantial step, including a mere attempt to intimidate, is sufficient under the statute. *See United States v. Collier*, 989 F.3d 212, 221 (2d Cir. 2021) ("conviction of

attempt requires proof of attempted force or intimidation"); *United States v. Wesley*, 417 F.3d 612, 618 (6th Cir. 2005) (defendant arrested one hour away from bank); *United States v. Moore*, 921 F.2d 207, 209 (9th Cir. 1990) (evidence of defendant walking toward bank wearing a ski mask while carrying gloves, pillowcases, and a gun sufficient); *United States v. McFadden*, 739 F.2d 149, 152 (4th Cir. 1984) (evidence that defendant proceeded to area of bank with vehicle and getaway driver sufficient to support conviction); *United States v. Jackson*, 560 F.2d 112, 116-17 (2d Cir. 1977) (attempted bank robbery statute does not require actual use of force, violence, or intimidation).

Mr. Taylor here urges the Court to adopt the position of the Second, Fourth, Sixth, and Ninth Circuits, and hold that an attempt to commit a bank-robbery-by-intimidation is covered by § 2113(a), even if the would-be robbers are stopped before they have intimidated or threatened anyone. The bank robbery statute itself explicitly segregates out the inchoate variant—attempt—as a separate crime, the elements of which are distinct from the elements of completed robbery. While a substantial step must be more than "mere preparation" and "unequivocal," it may be "non-violent," and so, as stated in *[Justin] Taylor*, "to know that much is enough to resolve" the elements clause debate. 142 S. Ct. at 2020. This applies just as well to attempted bank robbery as it does to attempted Hobbs Act robbery.

Accordingly, this Court should interpret the elements of attempted bank robbery under § 2113(a) as requiring no more than a substantial step, and that consistent with *[Justin] Taylor*, hold that the crime of attempted bank robbery does not categorically include the "use, attempted use, or threatened use of physical force against another

person," and is not a crime of violence under § 924(c)(3)(A)'s elements clause.

## III. The broader attempt offense in Section 2113(d) does not require the use or threat of force.

Even if the Court were to find that attempted bank robbery under § 2113(a) requires at least intimidation or threatened force, the *Taylor* analysis still controls with respect to § 2113(d). The crime of bank robbery in 18 U.S.C. § 2113(a) punishes "Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another." Subsection (d), punishes any "attempt[] to commit, any offense defined in subsection (a)." In other words, an "attempt[] to commit" "intimidation" violates the statute. Thus, even if an attempt to rob accompanied by a mere attempt to intimidate would not be unlawful under § 2113(a) alone, it would still be "an attempt[ ] to commit" an "offense defined in subsection (a)," and therefore would support liability under § 2113(d).

The reasoning of those circuits that rely on the textual separation of the intimidation element from the "take or attempt to take" element in subsection (a), focusing on the manner in which the statute is "parsed", *Bellew*, 369 F.3d at 454, is an analytical mismatch for the statutory language of subsection (d). Subsection (d) is not similarly placed within the taking element clause. Just as the Hobbs Act statute creates an umbrella attempt offense over the entirety of the substantive elements in 18 U.S.C. § 1951(a), the attempt offense in subsection (d) proscribes an umbrella attempt offense over the elements of § 2113.

Furthermore, reading the attempt provision in subsection (d) as applicable only to the taking element of subsection (a) renders the subsection (d) attempt phrase

superfluous. The words in § 2113(d) cannot be regarded as mere surplusage. *See Carter v. United States*, 530 U.S. 255, 262 (2000) (comparing text in subsections (a) and (b) and emphasizing that "extra clauses . . . 'cannot be regarded as mere surplusage; [they] mea[n] something.'") (*quoting Potter v. United States*, 155 U.S. 438, 446 (1894)).

For all of the foregoing reasons, the Court should find that § 2113(d) does not require a threat of physical force and is not a crime of violence predicate under § 924(c)(3)(A).

## CONCLUSION

Petitioner asks that this Court grant the petition and set the case for a decision on the merits.

Respectfully submitted,

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